No. 4443

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United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt,
KATIE WERNER,

Petitioner,

vs.

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation,

Respondents.

Petition for Rehearing

G. G. MORGAN PRINTING CO., PHOENIX, ARIZONA

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Comes now Katie Werner, petitioner in the above entitled cause and respectfully prays this Court for its order setting aside its decision herein, dated March 5, 1925, and granting her a rehearing of said cause on the grounds and for the reasons following, to-wit:

I.

That said decision is based on a misapprehension of the facts in that the Court failed to consider that the stipulation referred to in said decision and partially quoted therein, never became operative and

never was, in fact, a stipulation at all. This instrument expressly provided that, "It is further stipulated and agreed that all persons who have or assert liens upon the property herein described, shall be bound by the terms hereof upon assenting hereto in writing by the signing of this stipulation." See Par. 15, p. 11 of Stipulation.)

This petitioner alleged under oath in her petition to set aside this sale and the order confirming it that her attorneys signed same under the conditions that it was "intended and contemplated to the full knowledge of said firm of Zimmerman and Mulhern, said Arthur E. Price and said A. Henderson Stockton that said stipulation was to be presented to all parties having liens on said real property for their personal assent in writing and signature and that said stipulation should be personally assented to and signed by the particular lienor before becoming effective as to him or her." (Trans. of Record, line 27, page 56 to Line 4, page 57.) This allegation stands undenied and uncontroverted and therefore is admitted by respondents for the purpose of this proceeding. It is conclusively shown by the record that this stipulation was never signed or assented to by this petitioner, but on the contrary she, the next day after the signature by her attorneys and before any action had been taken thereon, or any rights instituted thereunder, notified the Referee that she would not sign or assent thereto. (See Stipulation and note at top of first page thereof.) Trans. of Record lines 4 to 8, page 57.

There being no stipulation, the filing by this petitioner of an application to be relieved of any re-

sponsibility thereunder on other grounds, because of the persistence of the Referee in assuming that there was such a stipulation, certainly would not estop her from showing that it had no existence. In other words, the Referee by ruling that the stipulation was in force could not thereby make a stipulation or an agreement for the parties without their consent. The Referee's ruling on her petition to be relieved from responsibility in no way determined that the stipulation was duly entered into, and said ruling being based on something that did not, in fact, exist, was an absolute nullity, and petitioner, to protect her interests was not required to have that order of the Referee reviewed. (See Decision of Referee on petition to be relieved from responsibilities, etc.)

II.

That this Court failed to determine the principal question in the case, that is, whether or not the sale by the Trustee was a public or private sale, and if a private sale, it was in direct contravention of Rule 18 of the Bankruptcy Rules of the Supreme Court of the United States and thereby prohibited. In this connection this Court also misapprehended the facts shown by the record in finding: "at the time and place so designated for the sale, no bidder appeared except the holder of the first mortgage, through counsel who wished to make their bid in the presence of the Referee and all parties in interest. Thereupon adjournment was taken to the office of the referee, where, in the presence of the present petitioner by her counsel and without any objection, the property in question was sold to the holder of the first mortgage thereon."

The Trustee's returns of the sale show: "That on the 7th day of February, 1924, pursuant to the notice contained in said advertisement, your trustee offered for sale at his office, Rooms 411-412 National Bank of Arizona Building the afore described real property and did not receive at said office of your petitioner any bid, but a bidder appeared there who desired to present his bid for said property to your trustee in the office of the referee in charge of the bankruptcy of David A. Jacobson." (Trans. of Record, Line 16, Page 40, and Line 27, Page 44.)

There was no adjournment of the sale from rooms 411-412 National Bank of Arizona Building to 208 Heard Building, as far as the public was concerned. The Trustee and first mortgagees, without any notice to any parties in interest, or to the public, simply agreed that the sale should be held at the latter place instead of the former and said agreement was made and acted upon before the hour when the public might anticipate the sale would be held. It is true that the **Trustee and first mortgagees** adjourned to room 208 Heard Building but this was not such an adjournment as found by this court. Had the sale been opened at the Trustee's office and held open there for a reasonable length of time on the date set therefor and then the parties present, if any, informed that it would be adjourned to the Referee's office and there continued, that would have been at most, an irregularity curable by confirmation. However, under the facts incontrovertibly shown by the return of sale, the public had absolutely no opportunity to bid and therefore under no theory could this be considered to have been a public sale. It is not the contention of this petition-

er that the sale should be set aside because of irregularities in the notice of sale, or in the place thereof or in the hours set, as was strenuously argued by respondents in their brief, but it is her contention, and she still respectfully submits, simply, that it was not a public sale but a private one prohibited by the rules of the Supreme Court of the United States.

To be now estopped from objecting to this sale by her failure to interpose objections or to file exceptions to the return of the Trustee prior to the confirmation by the Referee, as apparently held by this Court, this petitioner must be charged with the knowledge at that time or an acquiescence in the method of conducting same. (In re Torchia 188 Fed. 207; in re Burr Mfg. & Supply Co., 217 Fed. 16.) This petitioner knew nothing of what took place at the office of the Trustee on the morning of February 7, 1924, and had no way of knowing until the filing of the report and return of sale by the Trustee. (Trans. of Record pages 39—43 and 62 to 63.) She did not know but that the sale was properly and publicly open at the Trustee's office and the public given an opportunity to bid, for, contrary to the statements of counsel for respondents in their brief, she was not present or represented there, nor was any one else, except the Trustee and the attorney for the first mortgagees. (Trans. of Record pages 34 to 41.) The only thing she knew was that in the presence of her representative the property at ten o'clock A. M., was sold to the first mortgagees at a place other than the place of sale. (Trans. of Record, pages 39 to 43 and 62-63.) Only by examination of the return could she learn what occurred between the Trustee and the purchaser at the for-

mer's office on the date of sale. As a matter of fact, this examination was made by her counsel as soon as it was learned that the return had been filed some little time after the actual filing, and at that time the sale had already been confirmed by the Referee for the respective orders of confirmation were made just two minutes after the returns were filed. To be exact, the returns were filed at 11:55 a. m., and 11:54 a. m., and the orders of confirmation were made at 11:57 a. m., and 11:56 a. m., all on March 3, 1924. (Trans. of Record, pages 42, 47, 50 and 53.)

Under the circumstances, as conclusively shown by the Record, this petitioner cannot be said to be estopped by failure to object to the sale prior to the confirmation thereof.

This Court evidently considered that the fact that this petitioner took no steps to have the sale vacated until October 13th, 1924, it having been confirmed on March 3, 1924, was an element in estopping her from questioning it, but the record conclusively shows that between those dates there had been absolutely no change in the status of the matter; the purchasers had paid nothing on the purchase price; no steps toward transferring the title had been taken by the Trustee, the purchasers had in no way relinquished any rights or further obligated themselves in reliance upon the sale, and no rights of third parties had intervened. (Trans. of Record p. 63.) There is no showing or allegation whatsoever that the time taken by this petitioner was unreasonable or constituted laches in the slightest degree. It

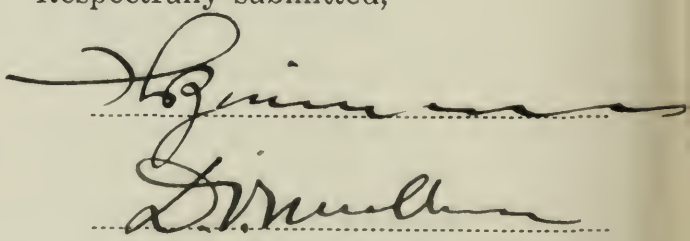
is our understanding that estoppal by laches must be based upon some actual or highly probable prejudice to others, and such was not the case here.

We respectfully call attention to the fact that the authorities mentioned in the decision of this court and theretofore cited by the respondents to support their theory that confirmation cures all defects in the proceedings, to-wit: Robertson vs. Howard 229 U. S. 254; 16 R. C. L. 85 and Nevada Nickel Syndicate vs. National Nickel Company 103 Fed. 391, held only that confirmation validates a sale as against **collateral attack,** and then only as to minor irregularities such as lack of appraisement, errors in description, publication, etc. In fact, said 16 Ruling Case Law at page 83, restricts the rule to "Confirmation determining, **until set aside,** and as against **collateral attack,** the rights of the parties," while the present proceeding is a direct application to have the order of confirmation set aside. Furthermore, the authorities cited in support of the theory of estoppel, to-wit: In re Torchia, 188 Fed. 207; In re Burr Mfg. & Supply Co.,, 217 Fed., 16; and Landsburgh vs. McCormick 224 Fed, 874, all turn upon the knowledge of the party objecting to the sale of all defects prior to confirmation, and then in the face of that knowledge, the allowance by him of the attaching of the rights of third parties or the distribution by the Court of the proceeds of the sale, or some such changes in circumstances.

Katie Werner, in her verified petition to set aside the order of sale, the sale, and the orders confirming the sale alleged: "That your petitioner is creditably informed, and verily believes, and therefore alleges

that no sale by public auction was had or held by said trustee at Rooms 411-412 National Bank of Arizona Building, at Phoenix, Arizona, on February 7th, 1924, or at any other time or place," and "To the actual knowledge at that time of said trustee and said bidders or purchasers said sale and the proceedings preliminary thereto were not so conducted as to obtain the best and highest price for said real property." These allegations, alone, if supported by competent evidence, would certainly necessitate the setting aside of the sale, and petitioner could not, under the circumstances shown by the record, be estopped from urging such objections. (16 R. C. L. 84.) The Referee, by his order summarily dismissing the petition deprived her of her right to place before the Court her evidence in support of these allegations. (Trans. of Rec. p. 68.) In other words, altho her petition stated a cause of action, she has never had her day in court and we earnestly submit that, even if this court should find on reexamination of the record that it may not set aside the sale on such record, the cause should be remanded to the District Court with directions that the Referee take the evidence in support of and against said petition and that due action be taken on the merits as disclosed by said evidence.

Respectfully submitted,



Attorneys for the Petitioner.

DISTRICT OF ARIZONA }
MARICOPA COUNTY } ss.

The undersigned, F. L. Zimmerman and D. V. Mulhern, attorneys for the Petitioner, Katie Werner, hereby certify that, in their judgment, the foregoing petition for rehearing is well founded and that it is not interposed for delay.

F. L. ZIMMERMAN,
D. V. MULHERN,
Attorneys for Petitioner